Public Prosecutor (Deputy Public Prosecutor) v Norman bin Ismail

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO B-05–21 OF 2008
LOW HOP BING, SURIYADI AND ZAINUN ALI JJCA
27 JUNE 2008

Constitutional Law — Fundamental liberties — Personal liberty — Whether general rule that once an accused has been acquitted by the High Court he remains a free man subject to overarching need to preserve integrity of prosecution's appeal — Courts of Judicature Act 1964 s 56A

Criminal Procedure — Appeal — Acquittal, against — Power to order remand of accused to prison pending disposal of prosecution's appeal against acquittal — Purpose of such power — Whether to preserve integrity of prosecution's appeal — Whether to ensure that prosecution's right to appeal not rendered academic or nugatory — Courts of Judicature Act 1964 s 56A

Criminal Procedure — Appeal — Acquittal, against — Whether accused may be remanded to prison pending disposal of prosecution's appeal against acquittal — Discretion of Court of Appeal to order remand or admit to bail, how exercised — Courts of Judicature Act 1964 s 56A

The accused had been acquitted and discharged of drug trafficking in the High Court. The prosecution appealed to the Court of Appeal against the acquittal. The accused was an Indonesian without any travel documentation and had, since his acquittal, been detained by the immigration authorities. The prosecution applied ex parte to the Court of Appeal under s 56A of the Courts of Judicature Act 1964 ('the Act'), for an order directing the accused be remanded pending the disposal of its appeal. The accused was arrested on the prosecution's application and the issue for the Court of Appeal to decide was whether it was just and proper to remand the accused to prison, or admit him to bail pending the disposal of the prosecution's appeal.

Held, allowing the application:

(1) Section 56A of the Act is a substantive provision that confers upon the

court the discretionary power to issue a warrant directing the accused be arrested, and the consequential order of either remanding the accused to prison or admitting him to bail. Section 56A applies upon the prosecution filing an appeal against an acquittal (see para 20).

(2) In deciding whether to order remand or admit to bail under the second limb of s 56A, the court has to exercise its discretion judicially and according to established judicial principles, having regard to all the facts and circumstances prevailing in each particular case. However, it is impossible and impracticable to set out a rigid formula (see paras 24–25).

(3) Section 56A of the Act is intended to preserve the integrity of the prosecution's appeal. Its specific purpose is to ensure that the right of the prosecution to appeal is not rendered academic or nugatory as a result of the absence or non-attendance of an accused who has been acquitted by the High Court. It is intended to facilitate a full hearing of the appeal on its merits so that justice is not only done to the accused, but also to the public and the State (see paras 30–31).

(4) In the instant case, since the accused was a foreigner without any travel document and without any fixed or proper place of abode, it was undesirable and eminently unsuitable for him to be released on bail as he could abscond, thereby defeating the ends of justice. The balance of justice lay in favour of a remand order (see paras 34–35).

[Bahasa Malaysia summary

Tertuduh telah dibebaskan dan dilepaskan daripada pengedaran dadah di Mahkamah Tinggi. Pihak pendakwaan telah merayu ke Mahkamah Rayuan terhadap pembebasan itu. Tertuduh adalah warganegara Indonesia yang tidak mempunyai dokumen perjalanan dan sejak pembebasannya, telah ditahan oleh pihak berkuasa imigresen. Pihak pendakwaan memohon secara ex parte ke Mahkamah Rayuan di bawah s 56A Akta Mahkamah Kehakiman 1964 ('Akta tersebut'), untuk perintah mengarahkan tertuduh ditahan sementara menunggu rayuan selesai. Tertuduh telah ditangkap atas permohonan pihak pendakwaan dan isu yang perlu diputuskan oleh Mahkamah Rayuan adalah sama ada adil dan wajar untuk menahan tertuduh di penjara, atau membenarkannya dijamin sementara menunggu keputusan rayuan pihak pendakwaan.

Diputuskan, membenarkan permohonan:

(1) Seksyen 56A Akta tersebut adalah peruntukan substantif yang memberikan mahkamah kuasa budi bicara untuk mengeluarkan waran

mengarahkan tertuduh ditangkap, dan perintah berbangkit sama ada untuk menahan tertuduh di penjara atau membenarkannya dijamin. Seksyen 56A terpakai ke atas pihak pendakwaan yang memfailkan rayuan terhadap pembebasan (lihat perenggan 20).

(2) Dalam memutuskan sama ada untuk memerintahkan penahanan atau membenarkan jaminan di bawah cabang kedua s 56A, mahkamah perlu menggunakan budi bicaranya secara adil dan menurut prinsip-prinsip kehakiman yang tetap, dengan mengambil kira kesemua fakta-fakta dan keadaan yang wujud dalam setiap kes tertentu. Walau bagaimanapun, ia adalah mustahil dan tidak praktikal untuk membuat formula yang tegar (lihat perenggan 24–25).

(3) Seksyen 56A Akta tersebut bertujuan untuk mengekalkan integriti rayuan pihak pendakwaan. Tujuan khususnya adalah untuk memastikan bahawa hak pihak pendakwaan untuk merayu tidak dianggap akademik atau tidak berguna akibat daripada ketiadaan atau ketidakhadiran tertuduh yang telah dibebaskan oleh Mahkamah Tinggi. Ia bertujuan untuk memudahkan perbicaraan penuh rayuan atas meritnya agar keadilan bukan hanya dilaksanakan kepada tertuduh, tetapi juga kepada orang awam dan negara (lihat perenggan 30–31).

(4) Dalam kes ini, memandangkan tertuduh adalah pendatang tanpa apa-apa dokumen perjalanan dan tanpa tempat tinggal yang tetap atau sesuai, ia adalah tidak diingini dan amat tidak sesuai untuk dia dibebaskan atas jaminan kerana dia boleh melarikan diri, dan dengan itu menggagalkan pelaksanaan keadilan. Imbangan keadilan lebih berpihak kepada perintah tahanan (lihat perenggan 34–35).]

Notes

For a case on appeal against acquittal, see 5(1) *Mallal's Digest* (4th Ed, 2007 Reissue) para 169.

For cases on personal liberty, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 2106–2113.

Cases referred to

Balasingham v PP [1959] MLJ 193 (refd)

Legislation referred to

Courts of Judicature Act 1964 s 56A
Courts of Judicature (Amendment) Act 1976 s 8
Courts of Judicature (Amendment) Act 1994 s 16(b)
Dangerous Drugs Act 1952 ss 39B(1)(a), 39B(2)
Evidence Act 1950 s 114(g)
Interpretation Acts 1948 and 1967 s 17A
Rules of the Court of Appeal 1994 r 58(3), 58(4)

Nurulhuda Nur'aini bt Mohamed Nor (Deputy Public Prosecutor, Attorney General's Chambers) for the appellant.
Respondent in person.

Low Hop Bing JCA (delivering judgment of the court):

NOTICE OF MOTION

[1] Before us is the prosecution's application by way of notice of motion under s 56A of the Courts of Judicature Act 1964, seeking a warrant directing that the respondent ('the accused') be arrested and brought before this court so as to remand him to prison pending the disposal of the prosecution's appeal by this court.

FACTUAL BACKGROUND

[2] This has been set out in the affidavit in support affirmed by the learned deputy public prosecutor Ms Nurulhuda Nur'aini bt Mohamed Nor.

[3] The accused was charged in the Ipoh High Court with an offence of drug trafficking under s 39B(1)(a) of the Dangerous Drugs Act 1952, punishable under s 39B(2) of the same Act.

[4] The accused was represented by counsel in the High Court.

[5] On 29 January 2008, at the close of the prosecution's case, the learned trial judicial commissioner acquitted and discharged the accused without calling for defence.

[6] On the basis of the evidence adduced for the prosecution at the trial, the affidavit in support averred that:

(a) On 20 May 2001, at about 8.30pm, SP5 together with his police party kept watch on the road leading to Kampung Tersusun, Tronoh Mines, in the district of Kinta, in the state of Perak;

(b) At about 9pm, SP5 saw four men, including the accused, walking from Kampung Tersusun towards the direction of the Ipoh-Lumut trunk road. Some 10 minutes later, the accused was seen walking from a food stall towards Kampung Tersusun. Five minutes later, the accused was seen carrying a bag in his left hand and walking from Kampung Tersusun towards the direction of the Ipoh-Lumut trunk road;

(c) When the accused arrived at the place where SP5 and his police party were based, he was detained by SP5. On checking the bag carried by the accused, SP5 recovered five slabs of substances which, upon analysis, were found to contain 4973g of cannabis; and

(d) SP5 and his police party also arrested the other three men and detained their Indonesian passports as well. However, they were subsequently released, as nothing incriminating was found on them.

[7] On 29 January 2008, in an oral judgment, the trial court acquitted and discharged the accused on the basis of s 114(g) of the Evidence Act 1950, holding that the prosecution's failure to call the three Indonesians had caused a break in the chain of evidence in the prosecution's case;

[8] The accused is apparently an Indonesian without any travel document. He has since 18 February 2008 been detained by the Perak Immigration Department at the Langkap Immigration Depot.

[9] Upon the prosecution's application on an ex parte basis, this court issued a warrant of arrest against the accused on 28 February 2008.

[10] The warrant was executed on 29 February 2008 and he was brought before this court on the same date.

[11] Pending the disposal of the prosecution's appeal, the prosecution has now filed this application for an order to remand the accused to prison.

SECTION 56A OF THE COURTS OF JUDICATURE ACT 1964

[12] In urging the court to order the remand of the accused, the prosecution submitted that the accused's presence at the hearing of the appeal is essential; otherwise the appeal would be rendered academic or nugatory.

[13] The accused was not legally represented at the hearing of this application. However, he did not dispute the fact that he is an Indonesian without any travel document and that he is now brought before this court on the warrant.

[14] In my judgment, the question that arises for determination herein may be stated as follows:

> Where an accused has been acquitted and discharged of an offence punishable with death sentence, and is a foreigner without any travel document, is it just and proper for the Court of Appeal to invoke s 56A of the Courts of Judicature Act

A 1964 and to issue a warrant directing that the accused be arrested and brought before it and to remand him to prison pending the disposal of the prosecution's appeal against the acquittal?

B **[15]** So far as I am aware, this question appears to be the first of its kind to be determined by this court. The significance is self-evident. It revolves around the resolution of the competing interest of the accused and that of the prosecution representing the public and hence the State. One end of the scale shows the fundamental liberty of the accused, while the other end reveals the C preservation of the integrity of the prosecution's appeal.

[16] The answer to the above question requires a careful consideration of s 56A as well as r 58(3) and (4) of the Court of Appeal Rules 1994 ('r 58(3) and (4)').

D

[17] Section 56A merits reproduction as follows:

56A On appeal against acquittal, accused may be arrested

E Where an appeal is presented against an acquittal, the Court of Appeal may issue a warrant directing that the accused be arrested and brought before it and may remand him to prison pending the disposal of the appeal or admit him to bail.

F **[18]** Section 56A was inserted by s 8 of the Courts of Judicature (Amendment) Act 1976 (Act A328). Pursuant to s 16(b) of the Courts of Judicature (Amendment) Act 1994 (Act A886), the words 'Court of Appeal' were subsequently included in place of the previous 'Supreme Court'.

G **[19]** Rule 58(3) and (4) where relevant read:

58(3) As soon as Notice of Appeal is filed by the Public Prosecutor as in subrule (1), the Court of Appeal may on an application by the Public Prosecutor issue a warrant directing that the accused be arrested and brought before it and may H remand him to prison pending the disposal of the appeal or admit him to bail in accordance with the provisions of s 56A of the Court of Judicature Act 1964.

(4) The application under subrule (3) may be made by motion *ex parte* …

I **[20]** Section 56A contains substantive provisions conferring upon this court the discretionary power to issue a warrant directing that the accused be arrested and the consequential order of either to remand the accused to prison or admit him to bail. This new section applies upon the prosecution filing an appeal against an acquittal.

[21] Rule 58(3) and (4) set out the procedural law pursuant to which the prosecution may move this court by way of notice of motion, such as in the instant application.

[22] Upon dealing with the prosecution's application:

(a) this court is empowered to issue a warrant against the acquitted accused; and

(b) on the execution of the warrant, the accused shall be brought before this court, and this court may either:

(i) remand the accused to prison; or

(ii) admit him to bail.

WARRANT OF ARREST

[23] As the prosecution has on 28 February 2008 applied ex parte and obtained a warrant against the accused under s 56A read with r 58(3) and (4) and that warrant has been executed on 29 February 2008, this court is only required to consider the second stage of s 56A ie either to remand the accused to prison or admit him to bail.

REMAND OR BAIL?

[24] The consideration of the order for remand or bail requires the construction of the second limb of s 56A. This court has to exercise the discretion judicially and according to established judicial principles, having regard to all the facts and circumstances prevailing in each particular case.

[25] Although the exercise of discretion by this court is not unprincipled, it is impossible and impracticable to set out a rigid formula in this regard.

[26] As a general rule, when an accused has been acquitted by the High Court, he remains a free man and every effort should be made to give effect to the order.

[27] However, this general rule must now be read in conjunction with the provisions of s 56A as alluded to above. It is the duty of this court to ascertain the intention of Parliament as expressed in s 56A.

[28] Section 17A of the Interpretation Acts 1948 and 1967 provides as follows:

A Regard to be had to the purpose of Act

> 17A In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose of object.

B

[29] The purpose of enacting s 56A may be discerned from the explanatory statement to the Courts of Judicature (Amendments) (No 2) Act 1975 Bill. The relevant portion of this explanatory statement reads as follows:

C

> This Bill seeks to amend the Courts of Judicature Act, 1964 … for the following purposes:
>
> (a) ...
>
> (b) to empower the Public Prosecutor to appeal to the Federal Court against any decision made by the High Court in the exercise of its criminal jurisdiction at first instance.

D

E **[30]** The purpose of s 56A is clearly to empower the prosecution to appeal against an acquittal ordered by the High Court. By way of corollary, it is intended to preserve the integrity of the prosecution's appeal.

[31] The amendment expressed in s 56A serves the specific purpose of
F ensuring that the right of the prosecution to appeal is not rendered academic or nugatory as a result of the absence or non-attendance of an accused who has been acquitted by the High Court. It is intended to facilitate a full hearing of the appeal on its merits so that justice is not only done to the accused but also to the public and the State.

G

[32] It needs to be noted that an appeal is a continuation of a trial; see eg *Balasingham v Public Prosecutor* [1959] MLJ 193 (HC) per Ismail Khan J (later CJ (Borneo)).

H **[33]** The integrity of the prosecution's appeal can only be preserved if the accused is placed in such a position as to conduce to the hearing and determination of the appeal in due course, which can never be realised in the absence or non-attendance of the accused. Hence, s 56A must be construed so as to promote that purpose.

I

[34] As the accused is a foreigner without any travel document and without any fixed or proper place of abode, it is undesirable and indeed eminently

unsuitable for him to be released on bail as he may well avail himself of the opportunity to abscond, thereby defeating the ends of justice.

CONCLUSION

[35] On the foregoing grounds, I hold that the balance of justice lies in favour of a remand order. The answer to the above question is in the affirmative. Hence, I allow the application and make an order that the accused be remanded in prison pending the disposal of the prosecution's appeal by this court. Meanwhile, the balance of justice will be placed in equilibrium by ordering an expeditious and speedy disposal of the prosecution's appeal. I therefore order that an early date be fixed for the hearing and disposal thereof.

[36] My learned brother, Suriyadi JCA and my learned sister, Zainun Ali JCA have read this judgment in draft and have expressed their agreement to make it the judgment of the court.

Application allowed.

Reported by Andrew Christopher Simon